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No. 259

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In the Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES T. HVASS, PETITIONER,

v.

THE HONORABLE HENRY N. GRAVEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, AND THE HONORABLE EDWIN R. HICKLIN, AS JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, BY ASSIGNMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 9-17) is not yet reported. The memorandum opinion of the District Court (Appendix B, *infra*, pp. 12-16) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 17) was entered June 26, 1958. The petition for a writ of

certiorari was filed August 6, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A district judge sitting by assignment in another district had dismissed an indictment for failure to state an offense. After his assignment there had expired, this Court reversed the decision and remanded the cause for further proceedings. The case was thereupon referred to another judge sitting in that district.

The question presented is whether a new motion to dismiss the indictment had to be assigned to the judge who decided the original motion.

STATUTE INVOLVED

Title 28, United States Code, Section 296, provides in part as follows:

> Powers upon designation and assignment.
>
> * * * * *
>
> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

STATEMENT

Petitioner was indicted in the Northern District of Iowa on March 20, 1956, for perjury committed in the court of the respondent Judge Henry N. Graven (R. 2). On March 21, 1956, Judge Graven assigned the matter to Judge George T. Mickelson, a judge of the District

of South Dakota, who was then assigned to the Northern District of Iowa (R. 3, Pet. 9-10). Petitioneer filed a motion to dismiss the indictment for failure to state facts sufficient to constitute an offense against the United States (R. 3, 27). Judge Mickelson dismissed the indictment by judgment entered December 27, 1956 (R. 4), *United States* v. *Hvass*, 147 F. Supp. 594 (N. D. Iowa), holding that Rule 3 of the District Court's Rules, under which the hearing was had at which the perjury was allegedly committed, was not a law of the United States under the perjury statute. He found it unnecessary to pass on the validity of Rule 3, which petitioner had attacked. On January 1, 1957, Judge Mickelson's assignment to the Northern District of Iowa expired (Pet. 10).

Thereafter the Government appealed to this Court under the Criminal Appeals Act, 18 U.S.C. 3731. This Court on March 3, 1958, reversed the judgment of the District Court, holding that the rule was a law of the United States within the purview of the perjury statute. The Court noted that the validity of Rule 3 was not properly before it. It remanded the cause to the District Court for further proceedings not inconsistent with this opinion. *United States* v. *Hvass*, 355 U. S. 570, 578.

On March 11, 1958, the respondent Judge Graven, as chief judge of the district, entered the following order:

> On March 20th, 1956, when the indictment was returned in this case the then United States District Judge for the Southern District of Iowa was disabled. He died in December, 1956. Since August, 1957, the Honorable Edwin R. Hicklin has been the United States District Judge for the Southern

> District of Iowa. He is the only out of district judge who now holds a current assignment to this District.
>
> IT IS, THEREFORE, ORDERED that all further proceedings in the above-entitled case will be handled by the Honorable Edwin R. Hicklin, United States District Judge for the Southern District of Iowa, with whom counsel in the case will take up all matters directly which relate to the case. [R. 21].

Meanwhile, petitioner filed a new motion to dismiss the indictment (R. 6, 20).

After receiving the order of assignment, petitioner's counsel wrote Judge Graven a letter (Appendix A, *infra*, pp. 9-11) in which he indicated that he intended to raise the issue of the validity of Rule 3, and argued that, since that issue had previously been presented to Judge Mickelson, the matter should again be referred to Judge Mickelson. Judge Graven treated the letter as a motion to review the order of March 11, and filed a memorandum opinion explaining the assignment (Appendix B, *infra*, pp. 12-16). He pointed out that, customarily, matters in which the judge of the Northern District of Iowa considered himself disqualified were handled by the judge of the Southern District; that, at the time petitioner's original motion was filed, the judge of the Southern District was disabled and for that reason Judge Mickelson had been generally assigned to the Northern District; that the assignment had not been extended after November 1957 because of Judge Hicklin's appointment to the Southern District. Judge Graven noted that, after Judge Mickelson's original decision, the case was on the docket as a dismissed case; that petitioner's new motion on remand would raise

issues not passed upon by Judge Mickelson and therefore would not involve any review of Judge Mickelson's action. Under these circumstances, Judge Graven affirmed his power to assign the cause in the usual fashion to the judge of the Southern District who was fully qualified since he had had no part in the drafting of Rule 3.

Petitioner thereupon instituted the present proceeding in the Eighth Circuit Court of Appeals for a writ of prohibition and mandamus requiring Judges Graven and Hicklin to negate the assignment to Judge Hicklin (R. 7-8). The court below unanimously denied the writ, finding that the district judge "* * * merely in due course as an administrative act routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court" (Pet. 14).

ARGUMENT

1. Petitioner concedes (Pet. 5) that, if Judge Mickelson did not have jurisdiction under 28 U.S.C. 296 to decide his present motion to dismiss the indictment, his petition for a writ of mandamus was properly denied. He therefore argues that his present motion to dismiss, although a new motion after the remand of the cause by this Court, was nevertheless a continuation of the original motion which Judge Mickelson had heard, and thus a matter "submitted to him" during the period of his assignment within the meaning of 28 U.S.C. 296.

The fact that petitioner renews arguments which he presented to Judge Mickelson and which Judge Mickelson found it unnecessary to pass upon does not, however, make the present motion to dismiss a continuation of the matter presented to Judge Mickelson. Judge

Mickelson had finally disposed of the matter before him when he entered a final order dismissing the indictment. Any ruling on the present motion will not in any way involve reconsideration of Judge Mickelson's decision which this Court subsequently overruled.[1] The present posture of the case is essentially the same as where a conviction is reversed and a new trial ordered: the fact that a defendant could, at that second trial, renew arguments he made at the first would not make the second trial a continuation of the first.

2. Moreover, even assuming that Judge Mickelson could properly have been assigned to the case, such assignment was not required. 28 U.S.C. 296, as the court below noted, is permissive in form. It provides that an assigned judge, after expiration of his assignment, "may * * * decide or join in the decision and final disposition of all matters submitted * * *".[2] It, therefore, is not mandatory in its terms.

The prevailing practice in the Eighth Circuit, as pointed out below (Pet. 14), is that one judge does not have exclusive power over a case, but that many judges may have jurisdiction over various phases of a case. See also, *e.g.*, *United States* v. *Jaffe*, 98 F. Supp. 191 (D.D.C.). Even if the present motion were not so far detached from Judge Mickelson's ruling as to make assignment to him improper under 28 U.S.C. 296, it

[1] It will be, in its effect, less connected with the judge's original decision than the order terminating probation which this court held in *Frad* v. *Kelly*, 302 U.S. 312, was beyond the power of a judge whose assignment to another district had terminated.

[2] The previous statute, 28 U.S.C. 22(c) (1940 ed., Supp. V), used the word "shall" rather than "may." *Sunrise Mayonnaise* v. *Swift & Co.*, 88 F. Supp. 187 (E.D. Pa.), which held referral mandatory, is inapposite because involved there was a motion for reargument.

is sufficiently unrelated to the issues on which he ruled that, in a district having a number of judges, it would be normal procedure for the matter to come up before another judge. The remand by this Court, it may also be noted, was to the District Court, not to a particular judge.[3]

Petitioner has not attacked the qualifications of the judge to whom the case is presently assigned, and thus is in effect complaining about the mere assignment. As stated below, "* * * a litigant has no vested right to have his case tried before any particular judge" (Pet. 15). *Levine* v. *United States*, 182 F. 2d 556 (C.A. 8), certiorari denied, 340 U. S. 921.

The District Court's action in assigning the cause in the usual fashion to the judge of the Southern District of Iowa, who normally acts when the judge of the Northern District is disqualified, was therefore well within its discretion (see Pet. 13-17); and the court below was correct in holding that there was no occasion for it to review that action by the extraordinary writ of mandamus or prohibition. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21; *La Buy* v. *Howes Leather Co.*, 352 U. S. 249.

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[3] Petitioner cites *United States* v. *Brooks*, 176 F. 2d 482 (C.A. 4), as in conflict, but there the remand was to a judge, not a court, to make a further finding in a case he had heard. Likewise, *United States* v. *Marachowsky*, 213 F. 2d 235 (C.A. 7), certiorari denied, 348 U. S. 826, is not apposite because there time for trial on the issue of guilt was mutually set for a date subsequent to the expiration of the visiting judge's assignment. The court held that the visiting judge had power to act in view of his prior action in the case, not that he was required to act.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE G. GILINSKY,
Attorneys.

SEPTEMBER 1958.

APPENDIX A

March 17, 1958

Honorable Henry N. Graven,
United States District Judge,
United States Court House,
Fort Dodge, Iowa.

Re: UNITED STATES *vs.* HVASS

DEAR JUDGE GRAVEN:

I am writing this letter as amicus curiae. As you probably know, the Order of the United States Supreme Court reinstating the indictment in the above action specifically provides that the question concerning the validity of Local Rule 3 was not passed on. You may also know that the original Order of the Court dismissing the indictment failed to pass on the validity of Local Rule 3, the Court dismissing the indictment on a different ground. It is, however, pointed out in the original Order dismissing the indictment that the question of validity was presented to the trial court for its determination. At the hearing on the original Motion to Dismiss, briefs were filed by both parties to the action, and in addition exhibits were offered in evidence and received by the Court on the question of the validity of Local Rule 3.

I therefore anticipated when the case was remanded and the indictment reinstated that the question of the validity of Local Rule 3 was still before the local court. Rather than prepare a motion for a reconsideration of the question which is still before the trial court, I felt that to be on the safe side, I should prepare a new motion on behalf of the defendant moving to dismiss the indictment specifically on the ground of the invalidity of Local Rule 3.

I anticipated that this matter was probably before

the Judge to whom the motion was originally made and none other. In view of your Order of March 11, 1958, which was received by my office on March 14, 1958, it appears that the motion should be presented to a Judge of another district sitting by designation other than the Judge to whom the matter was originally assigned by your Order of March 21, 1956.

It is my understanding of 28 U.S.C. ss. 296, which provides in part:

> A justice or judge who has sat by designation and and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

which was adopted in the 1948 judicial code that the only Judge who can properly hear this motion is the one to whom the matter was originally assigned. I believe that this conclusion is well supported by the authorities construing this statute as adopted in 1948. I respectfully call the court's attention to *Sunrise Mayonnaise, Inc.* vs. *Swift & Co.*, 88 F. Supp. 187 (E.D. Pa. 1949) and *United States* vs. *Brooks*, 176 F. 2d 482 (4th Cir. 1949). It seems to me that it was the intent of Congress in expanding the scope of this particular statute to avoid a situation that now presents itself. Other decisions decided prior to 1948 that may be of help are *Hicks* vs. *United States Shipping Board Emergency Fleet Corp.*, 14 F. 2d 316 (S.D. N.Y. 1926) and *Cheesman* vs. *Hart*, 42 Fed. 98 (C.C., D. Colo. 1890).

Insofar as the power of the court to reassign a case I respectfully call your attention to *United States* vs.

Heath, 103 F. Supp. 1 (D. Hawaii 1952) and *Johnson* vs. *Manhattan Ry. Co.*, 289 U.S. 479, 503, 53 S. Ct. 721, 730 (1933).

In view of the fact that oral arguments and written briefs have heretofore been submitted to the Judge to whom the matter was originally assigned, and in view of the provisions of 28 U.S.C. ss. 296, I would sincerely appreciate it if the Court would review its Order of March 11, 1958 and inform me of its decision.

Yours very truly,

WARREN B. KING

ah
cc:

Mr. F. E. Van Alstine, Mr. M. E. Rawlings, Mr. Charles Alan Wright, Mr. Charles T. Hvass.

APPENDIX B

Memorandum and Order on Application of the Defendant to Review Order of March 11, 1958, Relating to Assignment of Further Proceedings in the Case to Judge Edwin R. Hicklin

The Court is in receipt of a letter from counsel for the defendant in which this Court is requested to review its Order of March 11th, 1958, relating to the assignment of Judge Edwin R. Hicklin of further proceedings in this case. The said letter is placed on file in the files of the case and will be regarded as an application for a review of said Order.

Memorandum

During the fourteen years that this writer has been the Judge for this District he has continually held assignments to the Southern District of Iowa, and the Judges for the Southern District of Iowa have continually held assignments to this District. During that period, with the exception hereafter noted, no out-of-state Judge has held an assignment to this District. During that period, with the exception hereafter noted, any cases pending in either District which the Judge of that District preferred not to handle have been handled by the Judge of the other District. It has always been the preference of the Judge of this Court not to handle any criminal cases in which he had handled a civil matter related to the subject matter of the criminal charge and vice versa. The practice of the Judges of the Southern District has been the same. Where the Judge of either District preferred not to handle a certain case, the long-standing practice was for the Judge of the other District to handle the same. Commencing prior to 1956 the health of the then Judge of the Southern District of Iowa began to fail and in February 1956

he became incapacitated and he died in December 1956. His successor took office in August 1957. In order that some Judge might be available to handle emergency matters arising while the Judge of this District might be out of the state temporarily, Judge George T. Mickelson of the District of South Dakota received a general assignment to this District until November 1957. The assignment was a general assignment and was not an assignment to handle any particular cases or to handle a particular term. Subsequent to the assignment three cases were filed which the Judge of this Court preferred not to handle because he had previously handled a related criminal or civil phase. Because of the incapacity of the then Judge of the Southern District of Iowa, it was not possible to follow the long-standing practice of having him handle those cases. Because of this special situation, the Judge of this Court asked Judge Mickelson to handle those cases. Two of those cases were disposed of without trial.

The record in the present case shows that on December 27th, 1956, Judge Mickelson sustained the motion of the defendant to dismiss. The motion was sustained on the ground that the oath administered in the hearing was not an oath authorized by a law of the United States. The opinion of Judge Mickelson, 147 F. Supp. 594, contains the following statement:

> "The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the indictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury."

From December 27th, 1956, until March 3d, 1958, the case stood on the docket of this Court as a dismissed case. On March 3d, 1958, the United States Supreme Court reversed the holding of Judge Mickelson. In the meantime the general assignment of Judge Mickelson to this District had expired in November 1957. It was not extended because in the meantime Judge Hicklin had been appointed and qualified as the Judge of the Southern District of Iowa. He was promptly given a general assignment to this District. During the period that Judge Hicklin has been the Judge of the Southern District of Iowa the Judge of this Court put in several weeks trying certain criminal cases in that District upon the request of Judge Hicklin. In April, at the request of Judge Hicklin, the Judge of this Court will try another criminal case of some length in the Southern District of Iowa.

The request of this Court to Judge Mickelson to handle the present case arose out of an emergency which emergency is now past. The Judge of this Court was of the view that such being the case a return should be had to the practice of having the Judge of the Southern District handle cases in this District which the Judge of this District prefers not to handle. Judge Hicklin has been and is willing to reciprocate for the cases handled and to be handled by the Judge of this Court in his District. Judge Hicklin had no part in the drafting or adoption of Local Rule 3 and was not aware of the existence of the present case until the Judge of this Court asked him to handle it by way of reciprocation and in accord with the long-standing practice.

It is the view of this Court that when an outside Judge receives a general assignment to a District where the assignment does not specify any particular case or court session, such outside Judge may only handle such matters as he may be requested to handle by the

Judge of the District. It is the further view of the Court under the type of assignment referred to that the Judge of the District retains control of the docket of his District and the assignment of cases, subject only to the limitations that matters presently under consideration by the outside Judge should await his consideration and that reviews of his rulings and holdings should not be had. It is the further view of the Court that the Judge of the District by virtue of his right to administer the District may withdraw from an outside Judge any pending case which has been referred to such Judge subject to the limitations noted.

In the present case Judge Mickelson in his ruling gave consideration only to the contention of the defendant referred to in his opinion. He did not give consideration to and does not have under consideration any of the matters the defendant raises by the motion filed herein on March 11th, 1958. There is no ruling or holding of Judge Mickelson which is brought up for review by that motion or which could be brought up for review by that motion or in any other way.

The Court is of the view that the posture of the present case is not such as to put it beyond this Court's inherent power of administration and supervision. The Court is of the view that it was within the discretion of this Court to assign Judge Hicklin to handle further proceedings in the present case. The reasons for the Court exercising such discretion have been heretofore stated.

The Court is of the view that the cases cited by the defendant are not apposite to the situation in this case.

ORDER

IT IS HEREBY ORDERED that the Order heretofore made by this Court on March 11th, 1958, assigning the handling of further proceedings in the present case to

Judge Edwin R. Hicklin is adhered to and the same shall remain in full force and effect.

Signed in the Northern District of Iowa this 20th day of March, 1958, for entry in the Central Division.

HENRY N. GRAVEN,
United States District Judge.

The above is a true copy.

ATTEST:

CARL V. RILEY,
Clerk.
By JANE SULLIVAN,
Deputy Clerk.

[1] U. S. GOVERNMENT PRINTING OFFICE 1958